SUPREME COURT U.S.
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No. 09-600

In The

Supreme Court of the United States

YEWHALASHET ABEBE,

Petitioner,

v.

ERIC HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

MARC VAN DER HOUT
Counsel of Record
ZACHARY NIGHTINGALE
AVANTIKA SHASTRI
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000
ndca@vblaw.com

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ARGUMENT

The government fails to show why review in this case should be denied. Contrary to the government's arguments, the irreconcilable circuit split on the important and recurring question of law presented by this case warrants review by this Court. The Court should therefore grant review in this case and hold the case pursuant to further review of *De La Rosa v. Holder*, 579 F.3d 1327 (11th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3322 (U.S. Nov. 13, 2009) (No. 09-594).

1. Contrary to the government's assertions, this issue presents a Circuit split on an issue that remains vitally important today. Whether this split is characterized as a two- or three-way split is beside the point. The Board of Immigration Appeals (BIA)'s interpretation of the statutory counterpart rule in *Matter of Blake*, 23 I. & N. Dec. 722, *rev'd*, 489 F.3d 88 (2d Cir. 2007), is constitutionally impermissible and that constitutes the critical issue to be decided by this Court, as it requires a consistent practice across the country.[1]

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[1] Some lawful permanent residents (LPRs) are involuntarily – and perhaps even purposefully – moved from the Second Circuit to detention in other circuits, which can doom meritorious Section 212(c) claims. *E.g.*, *Matter of Ramcharran*, 2008 WL 4420107 (BIA Sept. 23, 2008) (Section 212(c) claim denied after LPR living in New York was transferred to detention in Texas).

Petitioner Abebe indisputably would have been eligible for Section 212(c) relief had his case originated in the Second Circuit. The government attempts to minimize that court as an "outlier" (Opp. 18) – a term hardly befitting the circuit that hears over one-quarter of all immigration cases and more than the combined total of cases from circuits agreeing with the government's position. *See* Judicial Business of the United States Courts: 2008 Annual Report of the Director, Table B-3 (2009), at http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf (2008 Annual Report).

The government does not dispute that the question presented has arisen in over 120 circuit and BIA cases since 2005. *See* Pet. App. 45a-52a, *De La Rosa* – a figure that does not include unreported decisions of immigration judges. Nor does a decline in Section 212(c) grants between 2004 and 2009 (Opp. 19) help the government, because that decline coincides with the BIA's 2005 decision in *Matter of Blake*, 23 I. & N. Dec. 722, *rev'd*, 489 F.3d 88 (2d Cir. 2007). It is hardly surprising that Section 212(c) grants dropped immediately after the BIA's unexpected "change in law," which eliminated Section 212(c) relief for hundreds of lawful permanent residents (LPRs) who previously were eligible for it. *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008); Pet. 15-16; *see also* Pet. 11-15 & nn.6-7, *De La Rosa* (citing specific cases).

The government's claim that Section 212(c) applications have decreased since 2004 – a claim that is

only partially supported with citations (Opp. 19) – is similarly unavailing.[2] LPRs in circuits governed by *Blake* are less likely to apply for Section 212(c) relief or to be informed by counsel or an immigration judge that they may do so. Moreover, because the government has not revealed the methodology underlying its (unpublished) statistics, it is unclear whether they include cases in which the government moves to "pretermit" Section 212(c) relief. *E.g.*, Pet. App. 3a, *De La Rosa*. And even the government admits that 858 LPRs were granted Section 212(c) relief in 2009. Opp. 19. A form of relief that allows over 800 people to avoid removal each year (and by extension, affects thousands of family members, employers, and friends) is far from unimportant.

Nor does Section 212(c)'s prospective repeal in 1996 reduce its importance as a present-day avenue for relief. For many LPRs who have lived here lawfully for decades, the issue will continue to arise when they apply for future immigration benefits, such as naturalization, and the government then tries to deport them. *E.g.*, *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009). Section 212(c) thus still affects hundreds if not thousands of people – far more than those likely affected by the statute at issue in *Flores-Villar v. United States*, 536 F.3d 990 (9th Cir.

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[2] With regard to the same statistics, in the opposition to cert. filed in *De La Rosa*, the government refers to unidentified "published and unpublished statistics" (Opp. 18 & n.7, *De La Rosa*).

2008), *cert. granted*, 78 U.S.L.W. 3546 (U.S. Mar. 22, 2010) (No. 09-5801). Cert. Opp. 17, *Flores-Villar*.

The government observes that this Court denied two similar petitions last year. However, as the government pointed out at the time, the circuits had not fully aired the issue. Cert. Opp. 9, *Gonzalez-Mesias v. Holder*, No. 08-605 (U.S. Mar. 9, 2009) (issue had not "fully percolated" (quotation marks omitted)); Cert. Opp. 13, *Birkett v. Holder*, No. 08-6816 (U.S. Mar. 9, 2009) (review would be "premature"). The government makes no such argument now. Moreover, the prior petitions did not identify the BIA's consistent practice of granting Section 212(c) relief to deportable LPRs in Petitioner's position or the frequency with which this issue arises. Pet. 15-16; *see also* Pet. 11-12 & Pet. App. 45a-52a, *De la Rosa*.

The BIA has essentially undone this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), repealing Section 212(c) for any LPR outside the Second Circuit who is deportable for a non-drug aggravated felony – unless the LPR fortuitously left the United States and returned. That erroneous constriction of Section 212(c) implicates undeniably powerful interests, as this Court observed: deportation "may result . . . in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also Padilla v. Kentucky*, 2010 WL 1222274, at *11 (U.S. Mar. 31, 2010) (describing "[t]he severity of deportation" as "the equivalent of banishment or exile" (quotation marks omitted)). These circumstances warrant this Court's review.

2. The government's merits arguments rely on distorting both Section 212(c)'s history and Petitioner's position.

a. The government argues that the BIA's sudden about-face in 2005 was not retroactive. Opp. 12-13. Yet the government cannot identify a single pre-2005 case holding that an LPR who was deportable for a "crime of violence" or "sexual abuse of a minor" offense was ineligible for Section 212(c) relief. Petitioner, by contrast, identified several contrary examples, including cases in which relief was granted but then withdrawn after *Blake* changed the law. Pet. 15-16; *see also* Pet. 11-12 nn.6-7, 15, *De La Rosa* (providing additional examples).

The government cavils that BIA decisions granting relief were not "precedent[ial]" (Opp. 13), without explaining why that should matter. Consistent uniform decisions, published or not, indicate agency practice. *See Cruz v. Attorney General*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) (noting "routine[ ]" BIA practice based on "ten unpublished opinions" with no contrary decision). If anything, non-publication suggests that the decisions were uncontroversial and did not involve the "alteration, modification, or clarification of an existing rule of law." BIA Practice Manual § 1.4(d)(i)(A). The unbroken string of unpublished opinions also "underline[s] the correctness" of similar reasoning in published decisions. *Perez-Enriquez v.*

Gonzales, 463 F.3d 1007, 1013 (9th Cir. 2006) (en banc).[3]

The BIA's approach before 2005 mirrors contemporaneous courts of appeals decisions, none of which the government addresses. Pet. 15-16. Even the government itself, when opposing Section 212(c) relief for an LPR convicted of a crime of violence, did not argue that relief was unavailable due to lack of a statutory counterpart. Appellees' Br. 11-12, *Cordes v. Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004). Such an argument, were it correct, would have easily resolved the case in the government's favor; instead, the LPR prevailed. *Cordes v. Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), *vacated on other grounds sub nom. Cordes v. Mukasey*, 517 F.3d 1094 (9th Cir. 2008). And the government argued in 2002 that "Congress could rationally have decided to eliminate [Section 212(c)] relief altogether for all aliens convicted of . . . crimes of violence" – a contention that only made sense because LPRs with "crime of

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[3] In 1992, the BIA held that an LPR convicted of attempted murder (a crime of violence) could apply for Section 212(c) relief, distinguishing firearms cases in which the LPR lacked "a comparable ground of excludability." *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 589-590 (BIA 1992). The BIA's remand "to afford the [LPR] an opportunity to apply for a [Section 212(c)] waiver" (*id.* at 591) would have been futile if all crimes of violence lacked statutory counterparts. That same year, the BIA found that an LPR convicted of murder was "deportable under a deportation provision analogous to the exclusion ground at section 212(a)(9)," i.e., crime involving moral turpitude. *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992).

violence" convictions were eligible for relief. Appellee's Br. *13, *United States v. Ubaldo-Figueroa*, 2002 WL 32254035 (9th Cir. Oct. 10, 2002). The government's advocacy was not inadvertent; it reflected the universal understanding before 2005 that "crime of violence" and "sexual abuse of a minor" offenses were waivable under Section 212(c).

Given this uniform practice, the government's suggestion that Petitioner could "have easily avoided" removal "by departing the country voluntarily at any point before his removal proceedings were initiated in 2004" is contrary to the well understood law up to that point. Opp. 19. In 2004, no immigration lawyer, judge, or even government lawyer would have told Petitioner that his eligibility for Section 212(c) relief depended on departing the country. The BIA and every circuit had agreed that deportable aliens need not depart, and the Solicitor General acquiesced in that reading of Section 212(c). Pet. 12; *see also* Pet. n.3, *De La Rosa* (listing cases). The government's suggestion that Petitioner should have anticipated in 2004 that the BIA would reverse course in 2005 is untenable. Equally untenable is the suggestion that Petitioner's presence was "'illegal.'" Opp. 19 (quoting *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006)). Petitioner lawfully entered the country as a refugee and has been accorded lawful permanent resident status since 1984. Pet. App. 88.

The government's assertion that the statutory counterpart test is "not new" (Opp. 19) is similarly misdirected. Before 2005, the BIA consistently held

that LPRs like Petitioner satisfied the test because their offenses had a statutory counterpart, namely "crime involving moral turpitude" (CIMT). The two deportation bases that categorically failed the test were "entry without inspection and firearms violations." Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995); *see also Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991).

The government claims (Opp. 4) that "the analytical underpinnings of its interpretation" were found in *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994), *abrogated by Abebe*, 554 F.3d 1203. The BIA did not think so; it treated LPRs deportable for "crime of violence" and "sexual abuse" offenses as eligible for Section 212(c) relief well after *Komarenko*, including in cases arising in the Ninth Circuit. *See Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (San Diego); *Cardona*, 2005 WL 3709244 (Seattle). The Ninth Circuit did too. *See Cordes*, 421 F.3d at 893, 898-899.[4]

Try as the government might, it cannot rewrite history. Before 2005, LPRs in Petitioner's situation were eligible for Section 212(c) relief. The BIA's later

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[4] *Komarenko* was an unremarkable application of the statutory counterpart rule to a firearms offense, namely assault with a deadly weapon under Cal. Penal Code § 245(a)(2), which was deemed to not constitute an excludable CIMT. Even if Komarenko had departed, he could not have sought Section 212(c) relief. The opposite is true of Petitioner.

contrary ruling was an unjustified, retroactive, arbitrary and capricious "change in law."

b. As Petitioner demonstrated, the BIA's new position distinguishes between (1) deportable LPRs who traveled abroad, were readmitted, and subsequently were placed in deportation proceedings, and (2) LPRs deportable on the same charge who never departed. Pet. 22-26. The government admits as much when it indicates that Petitioner would have been eligible for relief had he left the country (Opp. 19), yet it points to no rational basis for treating deportable LPRs who did not travel abroad less favorably than deportable LPRs who did. *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Matter of L-*, 1 I. & N. Dec. 1, 6 (Att'y Gen. 1940) ("To require [Petitioner] to go to Canada and re-enter will make him no better resident of this country.").[5]

The government's response depends primarily on distorting Petitioner's contentions. The government proceeds as though Petitioner sought to be treated like an LPR who "left the United States and attempted to return" but was placed in removal proceedings "based on a charge of inadmissibility." Opp.

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[5] The government contends (Opp. 13) that Congress's "enactment" of an "immigration provision" is constitutional if there is a "facially legitimate and bona fide reason" for it. Petitioner does not challenge any congressional "enactment," but an unconstitutional distinction created by a BIA decision that is inconsistent with the longstanding application of Section 212(c). Therefore, rational-basis review applies.

12. Petitioner made no such argument. Rather, the correct comparison is to "an LPR in deportation proceedings who had previously traveled abroad" and whose offense of conviction qualifies as a CIMT. Pet. 25. Such persons are eligible for Section 212(c) relief in deportation under the longstanding *nunc pro tunc* procedure. Pet. 10-12.

The government's mischaracterization of Petitioner's argument is perhaps understandable, because the government would rather argue that persons who have "already been admitted to the country" may be treated differently from persons "seeking admission." Opp. 13. But that is not the issue. The challenged distinction is among deportable LPRs, all of whom have "already been admitted to the country." As noted, the government does not even try to articulate any rational basis for distinguishing (especially retroactively) between deportable LPRs based only on whether they previously departed the country.

The government acknowledges Petitioner's actual argument once, in a footnote (Opp. 18 n.6), and even then its response is off-point. Contrary to the government's insinuation, grants of relief *nunc pro tunc* to deportable LPRs readmitted after departure are far from extraordinary; they represent a "long-established administrative practice" reflected in numerous BIA decisions. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972); *see also Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *Matter of S-*, 6 I. & N. Dec. 392,

396 (BIA 1954); *Hernandez-Casillas*, 20 I. & N. Dec. at 284 n.6 (refusing to overrule *G-A-* and *S-*). The government cites no case in which a deportable LPR's case was held insufficiently "extraordinary" for Section 212(c) relief *nunc pro tunc*.[6]

The government's suggestion that an equal protection claim fails unless the LPR can identify an inadmissibility subsection containing similar language to his deportation subsection (Opp. 2-3, 16) is baseless. An equal protection challenge to a governmental distinction (prior travel) that appears nowhere in the relevant statute (Section 212(c)) cannot be defeated by pointing to semantic variations in completely different statutory subsections (the inadmissibility provisions of Section 212(a) and the deportability provisions of Section 237).

As the Second Circuit reasoned, the government's "emphasis on similar language is strange." *Blake v. Carbone*, 489 F.3d 88, 102 (2d Cir. 2007). Congress plainly did not draft Section 212(a) and Section 237 on the theory that discrepancies in their terminology would determine the availability of relief under Section 212(c). Nor is it an answer that Petitioner is "not being treated any differently from other aliens" denied relief under *Blake* (Opp. 17-18), any more than

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[6] Nor was the LPR in *L-* "deported and subsequently reentering" (Opp. 18 n.6 (quotation marks omitted)); he voluntarily traveled to Yugoslavia, was readmitted on a reentry permit, and later received relief *nunc pro tunc* in deportation proceedings. 1 I. & N. Dec. at 4-6.

discrimination against red-headed people could be defended by pointing out that all redheads were treated alike. The government "cannot deflect an equal protection challenge by observing that . . . all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." *Williams v. Vermont*, 472 U.S. 14, 27 (1985); *see also Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out").

The government cites the Ninth Circuit's now abrogated decision in *Komarenko* as "persuasive." Opp. 14. The relative persuasiveness of the circuits' differing views is the very issue this Court should resolve on certiorari. For now, it suffices to note that Komarenko's offense was held to not be a CIMT and, accordingly, raised a different equal protection issue, as the government recognizes. *Id.* That analysis is irrelevant to this case, which involves the BIA's decision to treat deportable LPRs convicted of the same crime and deportable under the same charge differently depending on whether the LPR previously left the country.

The Second Circuit addressed that very question and answered it correctly. It did not require consideration of "the facts" of particular cases (Opp. 14); the BIA need only determine whether an LPR's statutory offense is a CIMT as well as an aggravated felony. *Blake v. Carbone*, 489 F.3d at 105. Nor did the Second

Circuit "vastly overstep" the judicial role. Opp. 15 (quotation marks omitted). Federal courts, including this Court, routinely review agency determinations that an offense is a CIMT. *E.g.*, *Jordan v. De George*, 341 U.S. 223, 223-224, 232 (1951) ("conspiracy to defraud the United States of taxes on distilled spirits" is a CIMT). Often, as here, the issue is not even disputed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARC VAN DER HOUT
Counsel of Record
ZACHARY NIGHTINGALE
AVANTIKA SHASTRI
VAN DER HOUT, BRIGAGLIANO
& NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

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